Supreme Court, U.S.
FILED
JAN 17 1992
OFFICE OF THE CLERK

No. 91-1042

IN THE

Supreme Court of the United States

October Term, 1991

THOMAS C. DOYLE, Detective; CITY OF EASTLAKE; JOHN DOES, Unknown Eastlake Police Officers,
Petitioners,

vs.

JAMES M. PECSI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ALBERT L. PUROLA
Counsel of Record
35000 Kaiser Court
Willoughby, Ohio 44094
(216) 951-2323
Attorney for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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I

The petitioners' first claim is that the five to six hour detention of a non-charged[1] occupant of a house searched pursuant to a warrant[2] ought to be held constitutional. They seek, in effect, to constitutionalize the facts of this case. The Sixth Circuit did not hold it was unconstitutional; it only said based on the record[3] available at this stage, the "reasonableness" of some of the detention was a question of fact.

Therefore, this petition seeks to have this Court decide something the Court of Appeals below did not decide. The Sixth Circuit decision is very much in line with this Court's cases, some of them very recent, that "application [of the fourth amendment reasonableness test] requires careful attention to the facts and circumstances of each particular case . . . ." *Graham v. Connor*, 490 U.S. 386, 396.

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[1] Astonishingly respondent Pecsi has now been indicted for possession of this allegedly stolen property. He was indicted September 17, 1991 for a February, 1988 event, after the Sixth Circuit reversed the District Court's grant of summary judgment.

[2] Much is made in the petitioners' argument that the validity of the warrant was not challenged. That assertion is incorrect. The warrant was attacked in the motion for judgment on the pleadings in the District Court. It is well to note respondent has yet had no opportunity to challenge the warrant in any meaningful way.

No doubt at trial the reasonableness of the warrant and the validity of the allegations given to the magistrate will be included to help to determine the entire contour of fourth amendment reasonableness. (Some specific criticism of the warrant was made in the Court of Appeals but it did not receive comment. That Court also concluded, incorrectly we argue, this was a valid warrant. Opinion of the Court of Appeals, appendix to the petition for certiorari, page A2.)

[3] It is common knowledge that "facts" at the summary judgment stage are usually developed in the lawyer's office, as opposed to the courtroom.

The petitioners seek a bright line rule (that detention of an occupant is reasonable where it is no longer than the time necessary to conduct the search) which is a complete reversal of this Court's 1979 observation in *Bell v. Wolfish*, 441 U.S. 520, that "reasonableness under the fourth amendment is not capable of precise definition or mechanical application," *id.*, 559, which *Graham* reaffirmed in 1989. And they seek to do it where the search was not for contraband,[4] but mere evidence, and where the crime at issue was receiving stolen property and there was no claim of threat, resistance or flight.

By finding there were "too many unanswered factual questions to be resolved on summary judgment," opinion of the Court of Appeals, page A5, appendix to petition for certiorari, the Sixth Circuit did nothing more or less than recognize "reasonableness" is "not capable of precise definition or mechanical application". *Bell v. Wolfish, supra.*

II

The petitioner's second question presented seeks to establish by national constitutional fiat what cannot be established by objective facts.

The Sixth Circuit held that the historical fourth amendment tests of reasonableness were not established by the stark assertions of the summary judgment record regarding the amount of time it may or may not have been necessary to hold James Pecsi at gun point in his house. As noted, a search for "evidence" without threat, or flight, or resistance does not provide the factual predicate for the question presented.

[4] The District Court and the Sixth Circuit both ignored the distinction identified in *Michigan v. Summers*, 452 U.S. 692, 705 n20, between a search for "contraband" and one for "mere evidence." This search was for evidence only, which is another reason the case does not actually raise the constitutional question presented.

No good reason is advanced to warrant retreat from long term principles that require us to look at the facts of each case in the fourth amendment context. Solicitude for the police does not require giving them carte blanche nor does it warrant ignoring the textual requirement of "reasonableness" found in the fourth amendment. To answer the petitioners' second question presented in the affirmative would have that effect.

III

Contrary to their earlier submission, the petitioners claim in essence there can never be any "clearly established law" in the fourth amendment arena since "reasonableness" must be decided on a case by case basis. And since liability only attaches after an officer violates "clearly established law", all police will be immune since they could not know in advance their conduct was unreasonable.

That this is a sophistry is self-evident. The "objective legal reasonableness" of this conduct turns on the factors identified in *Graham v. Connor*, plus whatever others may be relevant in examining the officer's conduct in a particular case. To suggest otherwise is to remove the fourth amendment from Section 1983 altogether.

Anderson v. Creighton, 483 U.S. 635 and *Harlow v. Fitzgerald*, 457 U.S. 800 provide a workable, if not perfect, test for balancing liability and immunity. Nothing about the facts of this case provides any basis for re-examining those tests, or for further segregating the fourth amendment from the rest of the Constitution.

CONCLUSION

Because the "reasonableness" inquiry will always be fact based there is no likelihood of conflict among the circuits on the tests to be applied in these cases. None is cited here.

The record here is too thin and too fact specific to justify the use of this Court's discretionary jurisdiction even if the legal question warranted it.

The petition for certiorari should be denied.

Respectfully submitted,

ALBERT L. PUROLA
Counsel of Record
35000 Kaiser Court, Suite 202
Willoughby, Ohio 44094
(216) 951-2323
Attorney for Respondent